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Supreme Court of the United States

October Term, 1976
No. 76-266

ORWIN B. GRIFFIN, JR.,
Petitioner,

vs.

RICHARD V. ZURZ, Individually and as Judge of the Court of Common Pleas for Summit County, Ohio; WILLIAM B. PIKE, Individually and as Referee of the Court of Common Pleas for Summit County, Ohio; and HOWARD L. CALHOUN, Individually and as an Officer of the Court of Common Pleas for Summit County, Ohio,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

Petitioner believes that it is imperative that this Court comprehend accurately the facts of this case and therefore submits the following in rebuttal of the very serious and inexcusable misrepresentations made by counsel for Respondents.

Please note that Respondents have not challenged any specific statements in the Petition. Thus the Petition should be regarded as fairly and accurately presenting the facts of the case. What Respondents have done instead is to try, by sly omission and juxtaposition, to create a false impression.

What the Petition sets forth, and all this Court need decide fundamentally, is the question of the validity of an unrequested, unprovoked and senseless "switching judges in midstream" of a trial. Every conscious lawyer knows that there is no such concept in law or reason as "switching judges" in the middle of a trial. The only other question is whether this Court will remedy flagrantly criminal conduct (the wilful denial of due process) by those who should be dedicated to upholding, not destroying, the Constitution.

ARGUMENT

I. The Original Trial Judge Never Made an Order Purporting to Transfer the Case, Nor Did Anyone Else Ever Make Such Order

The reader may remember from the Petition that the original judge, Judge Koledin, began the trial of the state court case, No. 282105, in February, 1971 and after five days of trial recessed the trial although it had not been completed. In October, 1971 he briefly resumed the trial, hearing argument on motions but no actual testimony. He again recessed the trial, with no explanation.

Now counsel for Respondents Zurz and Pike assert that "On November 9, 1971, Judge Koledin issued an Order stating that he had become ill and was, therefore, unable

to continue the trial." They also assert that "In the November 9, 1971 Order, Judge Koledin set the case for hearing before Judge Swaim on December 13, 1971 and '[set] aside the testimony that was heard in the five days of trial. . .' " These are repetitions of assertions made by District Judge Contie (Petition, Appendix A, p. A-2). *The quoted statements are both false and misleading.*

On November 9, 1971 Judge Koledin issued a Finding, not an Order. The Finding is included herein as Appendix PR-A.

A Finding is not an Order. In fact, there is no apparent official status to a Finding; and although there is no question that Judge Koledin issued this particular Finding, he did not sign it, which he would have done if it were to have official force. There is no provision in the state-wide Ohio rules (patterned almost exactly on the Federal Civil Rules), nor in any local rules, calling for a Finding by a judge with respect to pending motions. Apparently there was a custom of issuing a Finding as a courtesy preliminary to issuing a Judgment—perhaps to allow counsel to comment on it before a judgment is issued.

In this case the Finding issued on November 9, 1971 by Judge Koledin contained only a proposed order, not an actual order. Had it been intended as an actual order it would have ended with some such phrase as "It is so ordered." Instead, it ended with:

"Judgment order to be drawn accordingly."

As irrefutable proof that the Finding contained no order and was not intended as an order is the fact that Judge Koledin proceeded to issue an interlocutory Judgment on December 3, 1971 in which he ruled on the identical matters referred to in the Finding. (If the Finding

had had any validity, there would have been no reason to issue a Judgment covering the same matter.) The Judgment, unlike the Finding, was signed by Judge Koledin. Copy of that Judgment is included herein as Appendix PR-B.

Judge Koledin's interlocutory Judgment of December 3, 1971 varied from the proposed order in his Finding in significant respect. Thus, *the Judgment nowhere refers to another judge or purports to set aside any prior testimony*; nor does it intimate in any way that any other judge would become involved in the case. Instead, the Judgment merely states, with respect to a "new trial":

> "The Court further orders on its own motion that a new trial be granted in this cause and that the same be set for trial on December 13, 1971."

(This "order", as noted in the Petition, was considered by the state court of appeals to be "without legal import", which should have disposed of this entire controversy right then.)

The quoted language, even if valid, nowhere purports to transfer the trial—it merely purports to order a new trial. Under the ordinary procedures then in effect, any such new trial would have to be conducted by Judge Koledin, who was available and was the sole domestic relations judge of the Summit County Court of Common Pleas.

Nobody--not Judge Koledin[1], not any supervising or

1. A possible reason that Judge Koledin did not incorporate into his Judgment any "order" to have Judge Swaim preside over a "new trial" is that Petitioner took vigorous written exception to the proposals in the Finding. The gist of those exceptions was, of course, to question the need for a new trial and for another judge to be involved.

administrative judge, not anyone else—ever transferred, or even attempted to transfer, the trial to anyone. Even the state court of appeals, for all its other falsifications, made no claim that the trial was transferred; and the suggestion that the case was ever set for hearing before Judge Swaim as made by Respondents, the federal District Court, and the federal Circuit Court of Appeals is entirely false (and, Petitioner regrets to have to say, known by them to be false).

The points to be clearly understood here are two:

1—*There is no legal or logical way under any coherent system of jurisprudence that a trial can be transferred from one able-bodied judge to anyone else* (especially in the absence of any asserted or possible reason and over the objection of a party, which is admitted here); and

2—Even if there were, *nobody even attempted to transfer the trial*; and thus the second judge could not have jurisdiction or authority to act.

II. Judge Koledin Was Not Too Ill to Complete the Trial, Nor Did He Claim to Be

As noted above, Respondents assert that "On November 9, 1971, Judge Koledin issued an Order stating that he had become ill and was, therefore, unable to continue the trial." This is out of context as well as untrue, apparently to suggest that Judge Koledin was ill in November. This was not Judge Koledin's meaning or claim. What he said in the Finding was:

> "This matter is an unfortunate situation because the Court on February 3, 1971 began to hear this matter on its merits on the amended complaint and amended answer of the defendant.

> The Court, after five days of hearing the evidence, became ill and was unable to continue the matter. After the Court returned in three or four weeks, the attorneys did not seem diligent in having the matter set down and the court was negligent in not setting the matter down . . ." (Appendix PR-A, pp. 21-22)

Note that there is not even a hint or suggestion that the claimed illness lasted more than four weeks. Since the recess came on February 12, 1971 after the five days of hearing, this means that by his own admission Judge Koledin was back at work by about March 15, 1971. (Petitioner knows for certain that Judge Koledin was back at work by at least April 16, 1971 because Petitioner was in the courthouse that day applying for an auto registration.)

Judge Koledin never claimed illness with respect to Case No. 282105 other than for four weeks in February-March, 1971.

Far from claiming any inability to complete the trial, Judge Koledin freely admitted he was "negligent" throughout 1971 in not setting the trial down for completion. (This negligence was deliberate, in Petitioner's view, and was to accommodate Respondent Calhoun, who knew and had been told by Judge Koledin that there was no *prima facie* case against Petitioner.)

Petitioner has noted in various paragraphs of the Complaint in the instant case that Judge Koledin actually signed interlocutory orders on April 27, 1971 (this one in the presence of Petitioner) and July 2, 1971; that he resumed the trial briefly on October 21, 1971; that he issued his Finding on November 9, 1971; and that he issued his interlocutory Judgment on December 3, 1971. Certainly at all these times Judge Koledin was able to continue

and complete the trial; and no reason has been given for his failure and refusal to do so. Why, after admitting his negligence, he chose to "compound the felony" by issuing his fraudulent order for a "new trial", is a question he could not answer honestly and which he never tried to explain.

Judge Koledin continued to try other cases during 1971 and 1972, ran for and won reelection in November, 1972, and continued to try other cases until his resignation in early 1974. So the suggestion that he was unable, for health reasons or for any reason, to complete the trial, is totally untrue, as Respondents well know.

III. Petitioner Is Not Seeking a Review of a State Court Judgment—He Is Seeking to Prevent Enforcement of Purported Orders Which Have Not Been Preceded by a Due Process or Equal Protection Hearing, or for That Matter, by Any Hearing at All

Respondents claim that Petitioner has "appealed the judgment" in state courts. This is inaccurate. Petitioner has not been able to appeal in the state courts because there has not yet been a completed hearing or a final judgment at the trial court level. Respondents are trying to pass off a disgraceful abuse of a litigant by claiming he is seeking in federal court a second bite of the apple. This is a shoddy attempt to confuse the reader. *Petitioner has not yet gotten a first bite.* The basic facts are simple and indisputable; and the conclusions therefrom are inescapable:

1. Judge Koledin started the trial of Case No. 282105 and then refused to complete it, without reason. At one point he admitted being "negligent" but instead of doing his duty he engaged in deliberate fraud.

2. Judge Koledin, on December 3, 1971, while the trial was still pending before him, attempted to order a new trial.

3. Judge Koledin's "order" for a new trial was "without legal import." This is true not simply because the state appeals court so stated in its "opinion"—it is true because there is no legal, logical or coherent basis for ordering a new trial in the midst of a trial; and such an attempt not only leads to chaos but also is entirely incompatible with any definition of due process[2].

4. The state of affairs which existed on December 3, 1971, which was that of a trial in midst of hearing before Judge Koledin, was unchanged by the admittedly void "order" for a new trial. Thus the case remained before Judge Koledin and in midst of trial.

5. The purported "new trial" held by Judge Swaim on December 13, 1971, later claimed by the state court of appeals to be a continuation of the original trial with what that court labelled a "switching judges in midstream", was null and void and not a legal proceeding, inasmuch as the trial was still pending before Judge Koledin and had not been transferred, nor had there been any attempt to transfer it, to Judge Swaim or anyone else.

6. If the "proceeding" before Judge Swaim, whether called a "new trial" or a "continued trial", was void as having no authorization, then Judge Swaim's purported "judgment" was likewise void and without legal import.

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2. There are a multitude of reasons that Judge Koledin's "order" was void and senseless, as pointed out in the Petition (p. 15). Even taken at face value, the "order" was inchoate and incomplete, inasmuch as Ohio rules, like the Federal rules, require that a court ordering a new trial on its own motion must give a reason. No reason was stated or even suggested by Judge Koledin. See Federal Civil Rule No. 59 (d) and Ohio Civil Rule No. 59 (D).

7. If Judge Swaim's "judgment" was not legal, then Petitioner's "notice of appeal" and "appeal" to the Ohio court of appeals was without legal import, inasmuch as there was no judgment from which to appeal.[3]

Petitioner has waited patiently but in vain for the state courts to act with integrity. Comity has long since been satisfied. Where, as here, the fundamental right to constitutional due process has been so clearly violated, the federal courts can, and should, intervene. This is one of their major functions. See *Mitchum v. Foster*, 407 U.S. 225, at 243. Note, too, the Sixth Circuit Court of Appeals in the instant case believed it had jurisdiction. It simply concluded (on erroneous premises) that Petitioner had not been deprived of his constitutional rights.

IV. Jurisdiction—What It Is and Who Has It

District Judge Contie's dismissal of the instant action appears to be based on a view that, since the Court of Common Pleas had "jurisdiction" of the case, any judge of that Court could issue a judgment in the case which would be merely "voidable" but not void. This view defies legal concept and the dictates of common sense, as will be detailed below.

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3. Petitioner recognizes that there is an anomaly or arguable inconsistency in his appealing a judgment which he was contending was void. However, if he was correct that the judgment was void, the appeal proceedings logically must be regarded as void as well. The strange situation here is that the state appeals court *agreed* that the order for a new trial was "without legal import" but nevertheless tried to validate the "judgment" of Judge Swaim by declaring that there was a "switching judges in midstream" of a single trial and by *falsely* asserting that Petitioner (who they admitted had "objected to the switch in judges") had agreed to submit the case to the second judge. Petitioner cannot understand why he should be expected to accept a "judgment" arrived at with such flagrant dishonesty which is clearly evident in the record. Would the reader accept such a "judgment"?

According to Random House, jurisdiction is "the right, power or authority to administer justice by hearing and determining controversies." If this is a fair definition, it follows that the person(s) acting as fact-tinders, be it a single judge, a panel of judges, or a jury, must have jurisdiction. *The cases on jurisdiction are of no help in this regard, since there has never been a question like this before. That is, until this case there has never been a question of jurisdiction as between two judges of the same court,* for there was never more than a single fact-finder involved in the question of jurisdiction.

It advances logic not at all to say that the Court of Common Pleas has jurisdiction of a matter. It is still necessary that a judge of that court have jurisdiction, i.e. the right to hear and determine the controversy. Judge Swaim could not have jurisdiction to hear the case for the simple reason that Judge Koledin had that jurisdiction and never ceded it.

Nor does Judge Contie's comment that "While Judge Koledin may have had a duty to continue a trial he began, the mere fact that a different judge concluded the trial does not divest the Court of Common Pleas of jurisdiction over said action" face the issue. He assumes that Judge Swaim did continue and did conclude the trial. *This is, of course, the basic question—could Judge Swaim intervene while the case was before Judge Koledin*? Plaintiff-Appellant has never claimed that the Court of Common Pleas was divested of jurisdiction. But simply because the Court of Common Pleas has jurisdiction does not mean that each and every judge thereof can, without any assignment, sit "in place of" another judge "midstream".

The jurisdiction of a judge must be regarded as exclusive once he undertakes to hear the matter. This is

of course the federal rule; and to assert otherwise is to champion chaos.

The jurisdiction of a court, and the jurisdiction of a judge, are separate and distinct, because, as District Judge Contie and Respondents agree, there is a distinction between a court and a judge.[4] Yet they are claiming in effect that because the court had jurisdiction, any judge (even Judge Swaim, who at best was only a visiting judge) can walk into the courthouse, pick up the file in a case pending mid-trial before another judge, and have jurisdiction to conduct any kind of "proceeding" and issue any "judgment" he may desire! Preposterous!

V. Respondents Have Immunity Only If They Have Jurisdiction—and Then the Immunity Is Only From Damages, Not From an Injunction

a. Jurisdiction Must Be Found, Not Assumed

The District Court assumed and pre-supposed that Respondents Judge Zurz and Referee Pike had jurisdiction and therefore immunity. Petitioner agrees that, if they had jurisdiction they have immunity, according to the rule of *Pierson v. Ray*, 386 U.S. 547 (1967); although that case has a well-reasoned dissent which asks, "What about the judge who knowingly turns a trial into a 'kangaroo' court? Or one who intentionally flouts the Constitution in order to obtain a conviction?" (*ibid.* p. 566) To which Petitioner would add, "What about the judge who deliberately refuses to complete a trial?"

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4. It was precisely this distinction which was involved when Petitioner agreed that a transcript might be prepared and used as evidence by the "Court." Petitioner never agreed that anything might be considered by Judge Swaim, since Petitioner was objecting to his acting in the case in any manner.

But before we get to immunity we must determine whether jurisdiction exists. If Respondents acted in the absence of jurisdiction they have no immunity, as the Sixth Circuit Court of Appeals itself has clearly held. The case of *Azar v. Conley*, 456 F.2d 1382 (6th Cir. 1972) contained no allegation that a judge acted "in absence of all jurisdiction", but that is the precise allegation Petitioner here made against Respondents Zurz and Pike (cf. pars. 25, 29, 31 and 36 of the Complaint). *Azar* confirms the opinion in *Lynch v. Johnson*, 420 F.2d 818 (6th Cir. 1970) that judicial immunity does not protect a judge acting in clear absence of jurisdiction or in non-judicial activities. As the Court said, at p. 820:

> "A judge does not cease to be a judge when he undertakes to chair a PTA meeting, but, of course, he does not bring judicial immunity to that forum, either."

Petitioner considers that Judge Swaim's purported "proceeding" of December 13, 1971, wholly unauthorized, was not even up to the level of a PTA meeting; and in turn, Judge Zurz's attempt to enforce a "judgment" arising out of such a non-judicial "proceeding" is without legal import.

With respect to Respondent Referee Pike, the Court held in *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir. 1972) that it would not extend the doctrine of immunity to protect a prosecuting attorney who allegedly deliberately suppressed an F. B. I. report establishing the plaintiff's innocence, because such conduct would be "outside his quasi-judicial capacity and beyond the scope of 'duties constituting an integral part of the judicial process.'" (*ibid.* p. 1218). Is not the conduct of Referee Pike in purporting to hold a hearing, knowing that he had no

assignment of any sort, outside his quasi-judicial capacity? (If not, what is the function of an order of reference?)

It is beyond Petitioner's comprehension how the actions of Respondents Zurz and Pike can be regarded as within their jurisdiction. If, however, that can be established, it only gives them immunity from liability for damages; and that immunity does not prevent an injunction against their "orders."

b. The "Jurisdiction" of Judge Zurz

It is Petitioner's position that Defendant Zurz never obtained jurisdiction of Case No. 282105. As indicated in the foregoing sections, only Judge Koledin could have jurisdiction until the case is re-assigned. Judge Koledin did not attempt to re-assign the case, and no one else has since tried. (Obviously, since Judge Koledin resigned his office without completing the case, the presiding or supervising judge will now have to make an order re-assigning the case, which is still in midst of trial, to a sitting judge. That order must direct the new judge to either dismiss the complaint or to afford an opportunity for a unified hearing.) Thus, the second judge, Judge Swaim, had no jurisdiction to hear and determine the case. Since the only basis for the third judge, Judge Zurz, to act would be to enforce a valid judgment, and since the "judgment" of Judge Swaim is void (not merely voidable) for lack of jurisdiction and is the only purported final "judgment" in the case, Judge Zurz has no jurisdiction of the case and his purported "judgment" of January 28, 1975 is void (not merely voidable).

c. The "Jurisdiction" of Referee Pike

Under the Ohio Civil Rules, patterned after the Federal Civil Rules, and as acknowledged by the language of

the introductory paragraph of Judge Swaim's interlocutory "judgment" of August 4, 1971 (cf. par. 35 of the Complaint or Exhibit 2 attached to Memorandum and Affidavit in Opposition to Motion to Dismiss), a state referee can hear only those issues which are duly referred to him. Thus a referee's jurisdiction, or power or authority to hear an issue, rests upon his having been assigned by a judge to hear whatever issue(s) are specified in an order of reference.

Respondent Referee Pike was well aware of this jurisdictional prerequisite, and of course that is why the recitation appears in the purported "judgment". But the recitation is false—the certified copy of the record transmitted to the state appeals court, and other documentary evidence, clearly establishes that neither Judge Koledin nor any other judge referred any matters in the case to Referee Pike; and the Motion to Dismiss does not controvert this allegation as contained in the Complaint (pars. 35 & 36). Thus Referee Pike had no jurisdiction to recommend and approve the "judgment" of August 4, 1971 ordering Petitioner to jail. (Similarly, Judge Swaim had no jurisdiction to enter a "judgment" based on a void "proceeding" before Referee Pike; and in turn, Judge Zurz has no jurisdiction to enforce the jail term *via* his January 28, 1975 "judgment".)

The fact that Respondent Pike was a referee and was therefore eligible to be assigned to hear certain matters does not mean that he could hear any matter he chose. He could not act on his own. He had to await assignment from a judge.

d. The Conduct of Attorney Calhoun As An Officer of the Court

It is Petitioner's position that the action of Respondent Attorney Calhoun in preparing the purported "judgment" of January 28, 1975 for Judge Zurz and the purported "judgment" of August 4, 1971 for Judge Swaim was both (a) action under color of "state statute, custom or usage" as referred to in Sec. 1983 of the Civil Rights Act and (b) conduct intended to deprive Petitioner of due process and equal protection, forbidden under the Constitution and referred to in 28 U.S.C. Sec. 1343(3).

The District Court and Respondents cite cases involving suits by clients against their own attorneys, classic malpractice actions. Those cases are not applicable, because Attorney Calhoun was not counsel to the Petitioner here.

Nor is it a matter of an attorney, at an open hearing, exaggerating or misrepresenting facts in the course of representing his client (although Attorney Calhoun did this, too).

What is involved here is the preparation by an attorney, *as an officer of the court,* of a proposed judgment to be signed by a judge—in each case presented to the judge *ex parte.* Such preparation is sanctioned by universal legal law, custom and usage, and is not for the purpose of representing a client but rather to assist the judge. In such activity a lawyer must be meticulously accurate, especially as to material matters involving jurisdiction. Here, instead, Attorney Calhoun did not even grant opposing party the courtesy of showing what he intended to submit but 1) prepared and submitted the "judgment" of January 28, 1975 to Judge Zurz knowing that the latter had no jurisdiction of Case No. 282105 and 2) prepared and submitted the "judgment" of August 4, 1971 to Judge

Swaim (why not at least to Judge Koledin, one might ask?) knowing that it contained false statements of a material nature, also relating to jurisdiction.

VI. Some Further Misrepresentations by Respondent

Without conceding the accuracy of other parts of the Brief of Respondent Calhoun, Petitioner believes this Court should understand certain facts which have been misrepresented by Respondent Calhoun.

A. In its Statement of the Case, the Brief of Respondent Calhoun (p. 3) asserts that among the allegations of the Complaint, "It was further alleged that on November 9, 1971 by order Judge Koledin set the case for hearing before Judge Swaim." The Complaint, of course, made no such allegation, it being a major contention by Petitioner that no order, nor any purported order, was ever made which could serve as a basis for Judge Swaim to conduct any type of "hearing" in the state case. This is again an attempt by Respondent to mislead by trying to direct attention to the Finding of November 9 and away from the interlocutory Judgment of December 3.

B. In its Statement of Relevant Evidence, the Brief of Respondent Calhoun (p. 4) asserts that:

> "It was shown, however, that although Petitioner objected to Judge Swaim hearing the case, he did in fact stipulate that the evidence before Judge Koledin should be transcribed and submitted to Judge Swaim without reproducing such evidence (Petition, page 11)."

The stipulation, of course, did not even purport to submit anything to Judge Swaim—and it would have been curious indeed if it had, since all admit that Petitioner "objected to Judge Swaim hearing the case." The actual

stipulation is quoted at the foot of page 11 of the Petition, and it is followed immediately by 6 reasons that it could not be considered a submission of any part of the case to Judge Swaim.

C. In its Statement of Relevant Evidence, the Brief of Respondent Calhoun (p. 5) asserts that "The Court of Appeals did not say that the order in question was void as stated at page 10 of Petitioner's Brief [sic].". Respondent then refers to the purported "Judgment Entry" of the appeals court and prints that in its Brief (Appendix A thereof). *What Respondent is omitting is, of course, the purported "Opinion" of the same court, dated August 14, 1973. It was this "Opinion" from which Petitioner quoted in the Petition.* Petitioner submits that the "Opinion" of the state court of appeals, as quoted on pages 10-11 of the Petition, constitutes a clear and unequivocal statement that Judge Koledin's attempt to order a new trial was indeed void.

Petitioner did not include a copy of that "Opinion" in the Petition because, as explained in footnote 2 thereof (Petition p. 9), he does not wish to dignify it as a valid document. And, as Petitioner has argued herein, Judge Koledin's "order" for a new trial was void not simply because the state court of appeals said so but because by any logic it had to be regarded as void. However, for this Court's information, Petitioner will now include a copy of that "Opinion" as Appendix PR-C. Please note that the full "Opinion", to the extent it is grammatical, reflects the *non sequitur* of conceding that the "order" for a new trial was "without legal import" and yet claiming that the original trial continued by means of what that court terms a "switching judges in midstream".

D. By the time Respondent Calhoun's Brief gets to page 10, it does refer to the state court of appeals "Opinion" but misstates what that "Opinion" said. Respondent claims:

> "The Ohio Court of Appeals in its Opinion found that when Judge Koledin, after five days of trial, ordered a new trial before Judge Swaim, it was not a new trial in the classical sense since no judgment had been entered. It was, however, akin to declaring a mistrial and ordering the trial to recommence before Judge Swaim."

Let it be crystal clear that the Ohio Court of Appeals in its "Opinion" (Appendix PR-C herein) *did not find* that Judge Koledin ordered a new trial. It found just the opposite, i.e. that Judge Koledin's attempt to order a new trial was "without legal import." Nor did it find that the attempted "order" was akin to declaring a mistrial and ordering the trial to recommence. To the contrary, it did not claim that the trial "recommenced"—it claimed that the trial "continued" on December 13.

Nor did the appeals court claim there was a mistrial. It toyed with that idea but backed off immediately by saying "But why speculate . . ." The probable reason the court did not pursue any attempt to characterize anything as a "mistrial" is because there is no such concept in Ohio law (not even a reference to "mistrial" in Ohio's PAGE'S DIGEST). Furthermore, "mistrial" as commonly understood can have no application in a non-jury case such as this one was. Again, there was no suggestion of any *reason* that there should be a "mistrial" or that the trial should "recommence".

VII. The Basic Issue Is Simply Whether a Hearing Can Be Fragmented Between Two or More Fact-Finders, for No Reason and Over a Party's Objections

Let it be perfectly clear that Petitioner never agreed to any part of the irregular "procedure" which Ohio is attempting to impose in this matter. Even the state court of appeals, in its "Opinion", admits that ". . . appellant objected to the switch in judges . . ." (Appendix PR-C, page 27)

No rational person, then, can claim there has been due process where a trial is started by Judge K who then abandons it for no stated reason and where Judge S purports to intervene without the case having been transferred to him, all the while that Judge K is fully able to complete the trial but is instead hearing other cases.

Not only is there a lack of due process, there is a lack of any process at all. There is no logical way a "hearing" can be tossed about without any purported orders or any possible purpose. Just consider—

(a) if there can be one "switching" of judges mid-trial, without reason or purpose, what is to restrain the second judge from "switching" with a third judge, a third judge from "switching" with a fourth judge (in this case there were a possible 14 judges available!), and the fourth judge from "switching" with a fifth or even back to the original Judge Koledin, who might then start the "switching" process rolling all over again?

(b) where there is a "switching" of judges, which judge is the authorized fact-finder?

(c) which one (or more) of the "switching" judges is supposed to write the decision? Can he be overruled by another judge who has heard a different part of the case?

(d) Does a litigant have to present his case over and over again to each successive judge? Why should he without some indication that the "switching" will end?

(e) Which judge has the authority to end the trial? Or does it go on perpetually?

These are only a few of the idiotic ramifications of "switching judges in midstream" of a trial. It truly "boggles the mind."

CONCLUSION

It is understandable why Respondents have resorted to misrepresentation; and it is also understandable why various courts have likewise chosen to misrepresent the facts. However, that does not make their actions excusable, if legal ethics are to have any meaning. This case demonstrates clearly why state courts cannot yet be relied on to provide federal constitutional guarantees. To suggest that state courts can falsify and then cover that by terming it "harmless error", and that this precludes review by this Court, is to argue that any state can nullify the Constitution.

If this Court understands the simple facts of this case, it must conclude that Petitioner has been deprived of due process and equal protection. Petitioner requests that the Petition heretofore filed be granted.

Respectfully submitted,

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APPENDIX PR-A

Finding of Judge Koledin in the Court of Common Pleas

(Filed November 9, 1971)

No. 282105

IN THE COURT OF COMMON PLEAS

STATE OF OHIO

SS

SUMMIT COUNTY

MILDRED K. GRIFFIN,
Plaintiff,

vs.

ORWIN B. GRIFFIN, JR.
Defendant.

FINDING

SAM KOLEDIN - *Judge*

This matter came on hearing before the Court on the appeal from the defendant of the Referee's recommendation wherein the Referee found the defendant guilty of contempt of court, which came on hearing on May 17, 1971. The Referee granted the plaintiff a judgment in the sum of $1,400 for arrearages in support payments to her by the defendant.

This matter is an unfortunate situation because the Court on February 3, 1971 began to hear this matter on its merits on the amended complaint and amended answer of the defendant.

The Court, after five days of hearing the evidence, became ill and was unable to continue the matter. After the Court returned in three or four weeks, the attorneys did not seem diligent in having the matter set down and the court was negligent in not setting the matter down for final hearing to complete the matter.

The plaintiff in May or thereabouts then moved that the Court find the defendant guilty of contempt in view of the fact that he had stopped paying under the temporary order made on April 14, 1971. Defendant readily admitted to the Court that he did not pay under the court order, so there is no question of his being guilty of contempt and a judgment should issue to the plaintiff in the amount of the arrearage found by the Referee.

The motion in opposition to the plaintiff's motion is overruled.

The motion in opposition to the finding of the Referee is overruled.

The motion to dismiss and motion for judgment for the defendant is overruled.

The Court will take into consideration, however, that the defendant husband was laid off as of July 20, 1971 and as of that date the Court will modify the order of April 14, 1971 from $700 a month to $200 a month for the support of the minor children.

All further orders made on April 14, 1971 will remain in full force and effect.

The Court realizes this matter should be set down and the Court sets aside the testimony that was heard in five days of trial, from February [sic] through February 11th, and hereby sets the case for hearing before Judge Luther Swaim on December 13, 1971.

Judgment order to be drawn accordingly.

APPENDIX PR-B

Judgment of the Court of Common Pleas

(Dated December 3, 1971)

No. 282105

IN THE COURT OF COMMON PLEAS

STATE OF OHIO

SS

SUMMIT COUNTY

MILDRED K. GRIFFIN,
Plaintiff,

vs.

ORWIN B. GRIFFIN, JR.,
Defendant.

JUDGMENT

This matter came on hearing before the Court on October 21, 1971 on the various motions of the defendant.

The Court, upon consideration thereof, finds that the defendant's opposition to finding which the Court considers to be a motion for review of the Referee's finding of May 17, 1971 to plaintiff's motion of April 20, 1971 and defendant's motion of April 27, 1971, should be affirmed, and accordingly, it is hereby ordered and adjudged that the judgment entered on said finding on July 2, 1971 be and the same hereby is affirmed.

The Court, upon consideration of the motion of the defendant to dismiss this cause and for an order granting

judgment in favor of the defendant, dated July 28, 1971, finds that the same should be overruled. It is accordingly ordered and adjudged that said motion be and the same hereby is overruled.

The Court, upon consideration of motion of the defendant filed on August 16, 1971 for an order modifying the monthly support order to plaintiff heretofore made on April 14, 1970, finds that defendant's employment was terminated on or about July 20, 1971 and the Court accordingly orders that said monthly payments be and the same hereby are reduced to the sum of $200 per month, beginning with the month of August, 1971. All other orders of said date are to remain in full force and effect.

The Court further orders that that portion of defendant's said motion of said date for an order permitting defendant to enter and live at the premises known as 6768 Evergreen Road, Hudson, Ohio, for an order granting defendant exclusive custody of the minor children, for an order finding plaintiff in contempt of Court, and for other relief, is hereby overruled.

The Court further orders that the remaining motion of the defendant filed on August 16, 1971 to set aside the judgment on August 4, 1971, be and the same hereby is overruled.

The Court further orders on its own motion that a new trial be granted in this cause and that the same be set for trial on December 13, 1971.

/s/ SAM KOLEDIN
Judge

APPENDIX PR-C

Opinion of the Court of Appeals of Summit County

(Dated August 14, 1973)

Case No. 7129

STATE OF OHIO, SUMMIT COUNTY
IN THE COURT OF APPEALS
NINTH DISTRICT

MILDRED K. GRIFFIN,
Plaintiff-Appellee,

vs.

ORWIN B. GRIFFIN, JR.,
Defendant-Appellant.

OPINION

JONES, *P.J.*

Before this Court for review is an order of Judge Luther Swaim, sitting by assignment, of the Court of Common Pleas of Summit County, Ohio. In essence the order dissolved the marriage between Mildred Griffin, appellee and Orwin Griffin, appellant. Further, the order provided for custody of the two minor girls, issue of the marriage, support for the girls, and a distribution or division of the property, both real and personal.

The final order followed protracted litigation and, as a result of the order, 33 errors are assigned as prejudicial to the appellant. He seeks a reversal of the order after a review by this Court. In order to pass upon each error assigned, this Court will address itself to the issues raised

by the errors as a good many of them are basically duplications.

The first issue to be considered is whether or not Judge Swaim was qualified to sit on the case. Judge Swaim is retired and was assigned to Summit County as a Common Pleas Judge (visiting judge) by the Chief Justice of the Supreme Court of the State of Ohio. Art. IV, Sec. 6(c) of the Ohio Constitution provides that any voluntarily retired judge or one retired because of age may be assigned by the Chief Justice to active duty as a judge. Appellant argues that this amendment was not legally adopted by the people of the State of Ohio. We hold to the contrary and deny appellant relief as suggested by his assigned error 13 and all others referring to this issue.

The second issue that we address ourselves to is the significance of the order of Judge Koledin dated December 3, 1971, wherein he stated:

> "The Court further orders on its own motion that a new trial be granted in this cause and that the same be set for trial on December 13, 1971."

This language is to be found in an order disposing of two written motions. Subsequently to the filing of the pleadings, this divorce proceeding became at issue and the case was commenced before Judge Koledin in February of 1971. Five days of testimony was heard by the Judge when the case was continued due to illness of the Judge. Motions were filed by both parties between February, 1971 and December 3, 1971 when the above-quoted language was put in an order. To that point the trial of the case had not been completed. Thus, what significance can be attached to the language, "a new trial be granted"? What is the legal result of that language? The answer

is "none". A new trial cannot be ordered until an adverse judgment is of record. It might be argued that the legal import is that of a mistrial. But why speculate when it is obvious that a new trial could not be granted as there was not an adverse order upon which such a second order could be predicated. On the 13th of December, 1971, the case, in effect, that was commenced in February, 1971, continued. Three things of significance should be noted here. First, Judge Swaim sat in place of Judge Koledin and, secondly, all of the evidence presented in February, 1971, before Judge Koledin was stipulated to be presented before Judge Swaim. In effect the stipulation declared that if those same parties were to appear before Judge Swaim, their testimony (and exhibits) would be as previously given, reduced to writing and presented to Judge Swaim. Thirdly, appellant objected to the switch in judges and claimed that part of the order of December 3, 1971 was for naught. We agree that the part of the order of Judge Koledin of December 3, 1971 was without legal import. However, by stipulation, appellant agreed to have all of the February evidence before Judge Swaim. So the switch in judges, although irregular, did not result in error to the prejudice of appellant. In other words, the key to our ruling on this issue of switching judges in midstream is not provided for in the Civil Rules; however, under the circumstances of the facts of this case, it cannot be said that such an irregularity amounted to more than harmless error.

Another issue raised by the errors assigned concerns itself with the holding of Judge Swaim, i.e., granting the divorce, awarding the custody and child support and the division of property. A reading of the record discloses ample evidence upon which Judge Swaim could decide as he did in this regard. Appellant offered no evidence on his own behalf and it was up to the trier of the facts

to determine whether or not appellee had made out a case. He did and we agree. Accordingly, this issue, too, is resolved in favor of the appellee.

Appellant claims that Judge Koledin erred in admitting testimony of Dr. Clemente. Appellant objected to this and, apparently, the objection has not been ruled upon. The admission of the testimony was proper. Here, too, the error, if any, was harmless. Appellant complains that Judge Koledin erred in entering an order of July 2, 1971. At this point Judge Koledin adopted a referee's report. There is no error in this regard.

Hopefully, this Court has considered all of the issues brought to its attention for review. Judgment affirmed.

/s/ GEORGE M. JONES
Presiding Judge

HOFSTETTER, J.,
COOK, J., Concur.